

1 The opinion in support of the decision being entered today is *not* binding precedent  
2 of the Board.  
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4 UNITED STATES PATENT AND TRADEMARK OFFICE  
5  
6

7 BEFORE THE BOARD OF PATENT APPEALS  
8 AND INTERFERENCES  
9

10  
11 *Ex parte* HOWARD G. PAGE, MIKE O'BRIEN, and JAY CEE STRALEY  
12

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14 Appeal 2007-1333  
15 Application 09/498,515  
16 Technology Center 3600  
17

18  
19 Decided: November 6, 2007  
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21  
22 Before FRED E. McKELVEY, *Senior Administrative Patent Judge*, and  
23 LINDA E. HORNER and ANTON W. FETTING, *Administrative Patent Judges*.  
24 FETTING, *Administrative Patent Judge*.

25 DECISION ON APPEAL  
26  
27

28 STATEMENT OF CASE

29 Howard G. Page, Mike O'Brien, and Jay Cee Straley (Appellants) seek  
30 review under 35 U.S.C. § 134(a) of a final rejection of claims 1, 2, 5-8, 10-13,  
31 16-18, 20-23, and 25-27<sup>1</sup>, the only claims pending in the application on appeal.

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<sup>1</sup> Claims 3, 4, 14, and 15, rejected in the Final Rejection, were subsequently cancelled in the Appellants' Jan. 5, 2006 amendment, entered by the Examiner on Feb. 6, 2006.

1 We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b) (2002).

2  
3 We AFFIRM and DESIGNATE OUR AFFIRMANCE AS A NEW  
4 REJECTION.

5 The Appellants invented a video advertising system that selects and inserts  
6 video advertising into the video content of a video-on-demand system.  
7 (Specification 2:14-16). The invention selects video advertising for individual  
8 target viewers based on their viewer profile and their video content selection  
9 (Specification 3:13-15). The video advertising insertion system (1) receives a  
10 video stream carrying selected video content from a video-on-demand system,  
11 (2) selects and inserts video advertising into the video stream, and (3) transfers the  
12 video stream carrying both the selected video content and the selected video  
13 advertising for display to a target viewer. (Specification 3:18-23).

14 An understanding of the invention can be derived from a reading of  
15 exemplary claim 1, which is reproduced below [bracketed matter and some  
16 paragraphing added].

17 1. A method for providing video advertising where a video-on-  
18 demand system receives a request from a target viewer for selected  
19 video content, and in response, transfers the selected video content in  
20 a video stream to the target viewer, the method comprising:

21 [1] selecting video advertising that has a subject matter relation to the  
22 selected video content requested by the target viewer;

23 [2] inserting the selected video advertising into the video stream that  
24 transfers the selected video content to the target viewer;

25 [3] transferring the selected video content to the target viewer over a  
26 first transport system and

27 [4] transferring the selected video advertising to the target viewer over  
28 a second transport system,

1 [5] wherein the first transport system uses greater bandwidth for video  
2 transfer than the second transport system; and

3 [6] disabling fast-forward capability when the selected video  
4 advertising is displayed.

5 This appeal arises from the Examiner's Final Rejection, mailed November 8,  
6 2005. The Appellants filed an Appeal Brief in support of the appeal on March 7,  
7 2006, and an Examiner's Answer to the Appeal Brief was mailed on June 6, 2006.  
8 A Reply Brief was filed on July 31, 2006.

9  
10 PRIOR ART

11 The Examiner relies upon the following prior art:

12 Eyer US 6,588,015 B1 Jul. 01, 2003  
13 (filed Jan. 14, 1998)

14 Swix US 6,718,551 B1 Apr. 06, 2004  
15 (filed Dec. 21, 1999)

16 NDS: NDS' XTV™ *Time Shifting Technology Empowers the Viewer and*  
17 *the Broadcaster*, M2 Presswire (Sep. 10, 1999) (XTV).

18  
19 In addition, in this opinion we discuss the following prior art:

20 Digital Audio-Visual Council, *DAVIC 1.2 Specification Part 4, Delivery*  
21 *System Architecture and Interfaces* (1997<sup>2</sup>) (DAVIC).  
22

23 REJECTION

24 Claims 1, 2, 5-8, 10-13, 16-18, 20-23, and 25-27 stand rejected under 35  
25 U.S.C. § 103(a) as unpatentable over the combined disclosures of Swix, Eyer and

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<sup>2</sup> [http://www.davic.org/Download/Spec1\\_2/part04.pdf](http://www.davic.org/Download/Spec1_2/part04.pdf)  
The complete specifications are available at <http://www.davic.org/>.

1 XTV.

2 ISSUES

3 The Examiner found that Swix teaches (1) selecting video advertising that  
4 has a subject matter relation to the selected video content requested by the target  
5 viewer; (2) inserting the selected video advertising into the video stream that  
6 transfers the selected video content to the target viewer; (3) caching the video  
7 advertising using a user device, and (4) displaying the video advertising and the  
8 selected video content to the viewer interface (Answer 3). The Examiner further  
9 found that Swix teaches transferring the video content over a first transport system  
10 (channel) and the advertising over a second transport system (channel) (*Id.*).

11 The Examiner determined a difference exists between Swix and the claimed  
12 subject matter: Swix does not teach disabling fast-forward capability when the  
13 selected video advertising is displayed (*Id.*).

14 To overcome any difference, the Examiner still further found that XTV  
15 teaches a set-top-box which provides advertisers with the ability to totally prevent  
16 viewers from skipping ads, although XTV does not indicate how ads are skipped.  
17 The Examiner also found that Eyer teaches that it is possible to force a subscriber  
18 to listen to certain commercials by disabling the ability to FAST FORWARD or  
19 SKIP FORWARD (*Id.*).

20 We understand the Examiner to have found that XTV's description of  
21 preventing ad skipping suggests disabling whatever would otherwise have enabled  
22 such ad skipping and concluded that it would have been obvious to one of ordinary  
23 skill in the art at the time of the invention to disable the ability of fast forward or  
24 skip forward in order to force the subscriber to view the commercials.

1       The Examiner further found that Eyer suggests disabling the fast forward or  
2 skip forward function of the set-top box of Swix, to provide the advantage of  
3 preventing the ad skipping function, taught in XTV (Answer 3-4).

4       The Appellants contend that Swix does not teach or suggest first and second  
5 transport systems (Appeal Br. 4). The Appellants also contend that Swix discloses  
6 one transport system (i.e., the head end 110) that utilizes one or more channels  
7 (*Id.*). Based on these contentions, the Appellants conclude that because Swix  
8 describes only a single system, it describes only a single source of the video  
9 (Appeal Br. 4-5).

10       The Appellants also contend that Swix does not teach a first transport system  
11 that uses greater bandwidth for video transfer than a second transfer system, and  
12 Swix does not discuss the bandwidth capacities of the channels of the broadcast  
13 server (Appeal Br. 5). Instead, Swix discloses a bandwidth savings achieved by  
14 using a single channel for delivering all video advertisements for all viewer  
15 demographic groups (*Id.*).

16       Thus, the issue pertinent to this appeal is whether the Appellants have  
17 sustained their burden of showing that the Examiner erred in rejecting claims 1, 2,  
18 5-8, 10-13, 16-18, 20-23, and 25-27 under 35 U.S.C. § 103(a) as unpatentable over  
19 Swix, Eyer and XTV.

20       The pertinent issue turns on whether Swix describes or suggests two  
21 transport systems where one has a higher bandwidth than the other.

FINDING OF FACT

The following enumerated Findings of Fact (FF) are believed to be supported by a preponderance of the evidence.

*Claim Construction*

01. The Specification does not define the word “transport” or the phrase “transport system.”

02. The usual and customary meaning of “transport” is to carry from one place to another; convey<sup>3</sup>.

03. Thus, the usual and customary meaning of a transport system is a system to carry from one place to another.

*Swix*

04. Swix is directed toward providing targeted advertisements to specific consumers (Swix, col. 1, ll. 15-18).

05. Swix provides targeted advertisements over a networked media delivery system by tracking and storing viewing events (e.g., such as menu choices or changes in programming), analyzing the events, and delivering targeted advertisements that appeal to the particular subscriber generating the events. By collecting data on viewing habits and analyzing that data in light of other subscriber account information (from other subscriber databases), Swix is able to intelligently select and display advertisements that offer products or services a viewer is truly interested in purchasing. Further, Swix can deliver different

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<sup>3</sup> *The American Heritage Dictionary of the English Language* (4<sup>th</sup> ed. 2000).

1 advertisements to different viewers watching the same program or  
2 channel (Swix, col. 3, ll. 27-47).

3 06. The primary components of Swix “include a merge processor 100, a  
4 file server 102, a profile processor 104, and a broadcast server 105,  
5 connected to a plurality of set-top boxes 108. Together, these  
6 components record network use by individual subscribers, store and  
7 organize data associated with the network use, analyze the data to  
8 identify interests of an individual subscriber, classify the individual  
9 subscriber in a demographic group, and deliver an advertisement  
10 targeted for her demographic group to the individual subscriber. Merge  
11 processor 100, file server 102, and broadcast server 105 reside in a head  
12 end 110, typically operated by a media service provider, and are  
13 connected to a plurality of set-top boxes 108 through a distributed media  
14 delivery network 106, such as a satellite, cable, or fiberoptic network.”  
15 (Swix, col. 3, l. 65 – col. 4, l. 11.)

16 07. “File server 102 stores display data to be delivered to the plurality of  
17 set-top boxes in response to a subscriber selection. ... In addition to  
18 storing and delivering display data, file server 102 also communicates  
19 with the plurality of set-top boxes, performing such functions as  
20 assigning each set-top box to a demographic group and directing each  
21 set-top box to tune to particular channels.” (Swix, col. 4, ll. 39-57.)

22 08. “In contrast to the interactive sessions of file server 102, broadcast  
23 server 105 delivers a continuous stream of display data within a  
24 broadcast environment. Broadcast server 105 delivers multiple video  
25 streams on separate channels and, unlike file server 102, does not

1           participate in dynamic interchange with the set-top boxes. Instead, the  
2           set-top boxes tune to the particular channels that contain programming  
3           corresponding to their individual demographic groups.” (Swix, col. 4,  
4           ll. 58-65.)

5           09. “Profile processor 104 receives event data from merge processor 100  
6           and additional data from several other sources to construct a consumer  
7           profile of a subscriber. In constructing a profile, profile processor 104  
8           analyzes the data to identify a subscriber's viewing habits and  
9           corresponding interests.... Once the analysis is complete, profile  
10          processor 104 instructs file server 102 to deliver a particular  
11          advertisement to the set-top box of the viewer. Profile processor 104  
12          performs data source analyses and issues instructions concurrently  
13          among multiple viewers so that multiple viewers watching the same  
14          show can receive different advertisements.” (Swix, col. 4, l. 66 – col. 5,  
15          l. 21.)

16          10. “Accordingly, it is an object of Swix to provide a system and method  
17          for delivering targeted advertisements to the types of consumers most  
18          likely to purchase the advertised product or service. It is another object  
19          of Swix to provide targeted advertising that reaches a large audience,  
20          that monitors and assesses each viewer of that audience to determine  
21          purchasing interests, and that displays advertisements to each viewer  
22          corresponding to her purchasing interests. ... It is another object of  
23          Swix to provide a means for displaying different commercials to  
24          individual viewers watching the same channel.” (Swix, col. 5, ll. 29-49.)

1           11. Swix, Fig. 5 illustrates a schematic diagram of the method by which  
2           the set-top boxes switch from the programming streams to the  
3           advertisement insertion streams. "Program broadcast 500 is a  
4           continuous broadcast running on a particular quadrature amplitude  
5           modulation (QAM) channel in a particular program identification (PID).  
6           In FIG. 1, broadcast server 105 delivers this program broadcast 500. The  
7           continuous broadcast indicates the beginning of an advertisement  
8           insertion slot with a signal in the broadcast transmission, known as a  
9           q-tone 502. Ad 1 in program 500 would be, for example, a national  
10          advertisement that is not targeted. In contrast, Ad A, Ad B, and Ad C  
11          would be targeted local advertisements running on broadcasts 510, 512  
12          and 514, respectively. Program broadcast 500 and broadcasts 510, 512,  
13          and 514 would each have different PIDs [program identifications].  
14          (Swix, col. 13, ll. 11-23.)

15          12. "Thus, at q-tone 502, head end 110 communicates to each set-top box  
16          two items of tuning information. Knowing the customer profile or  
17          demographic group of the subscribers, head end 110 tells each set-top  
18          box 1) which PID to tune to, and 2) for how long, i.e., the duration of the  
19          advertisement insertion slot. Accordingly, the set-top boxes off-tune to  
20          the separate advertisement channel for the specified duration and tune  
21          back to program broadcast 500 after the advertisement insertion slot to  
22          resume watching the continuous broadcast program. In this manner, two  
23          subscribers watching the same program broadcast 500 can receive two  
24          different advertisements appealing to their individual tastes and viewing  
25          habits." (Swix, col. 13, ll. 24-36.)

1           13. “The separate advertisement channel in Swix can be either another  
2           programming channel whose advertisement insertion slots coincide with  
3           program broadcast 500 or can be a continuous stream of advertisements  
4           with no programming. The continuous stream of advertisements is  
5           preferred if the intervals of the advertisements line up with the  
6           programming channels that switch to it. In FIG. 5, channel 516  
7           represents a continuous stream of advertisements to which program  
8           broadcast 500 can off-tune, e.g., to off-tune to Ad X for advertisement  
9           insertion slot 2. Optionally, instead of tuning to video advertisements, a  
10          set-top box could retrieve bit map advertisements spooled in a broadcast  
11          carousel format.” (Swix, col. 13, ll. 37-48.)

12          14. “The advantage of off-tuning the set-top box is a savings in  
13          bandwidth. Instead of delivering a separate video stream with targeted  
14          advertisements to each demographic group of subscribers, the off-tuning  
15          uses only one continuous broadcasting channel and tunes to other  
16          channels to deliver targeted advertisements.” (Swix, col. 13, ll. 49-54.)

17          15. Thus, Swix describes the following, undisputed by the Appellants:

- 18           a. selecting video advertising that has a subject matter relation to the  
19           selected video content requested by the target viewer;
- 20           b. inserting the selected video advertising into the video stream that  
21           transfers the selected video content to the target viewer; caching  
22           the video advertising using a user device;
- 23           c. displaying the video advertising and the selected video content to  
24           the viewer interface; and

d. transferring the video content over a first channel and the  
advertising over a second channel.

*Eyer*

16. Eyer is directed toward for providing a broadcast digital radio service  
in which the user is afforded various interactive features (Eyer, col. 1,  
ll. 6-8).

17. For marketing purposes, Eyer provides “a plurality of service tiers,  
e.g., a free or basic service level, and one or more premium (subscriber)  
levels. For example, a free service level would have a number of  
commercials for each hour of music or other programming, while a mid  
level premium service has fewer commercials, and a high level premium  
service has no commercials. This can be achieved by providing only the  
paying customers with data which indicates access points for the  
program segments. The access points allow a user to skip forward or  
backward to a program segment which is stored in the buffer after the  
user has begun to play a current program segment. In this manner, some  
users can skip over at least some of the commercial segments, while  
others cannot skip over the commercial segments. Moreover, for the  
mid and high levels, the commercials may be skipped automatically or at  
the user's discretion.” (Eyer, col. 2, ll. 44-60.)

*XTV*

18. XTV is an article about time shifting digital storage technology. It  
describes a set top box, referred to as XTV, that has the capacity to  
prevent ad skipping.

PRINCIPLES OF LAW

*Claim Construction*

During examination of a patent application, pending claims are given their broadest reasonable construction consistent with the specification. *In re Prater*, 415 F.2d 1393, 1404-05, 162 USPQ 541, 550-551 (CCPA 1969); *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1364, 70 USPQ2d 1827, 1834 (Fed. Cir. 2004).

Although a patent applicant is entitled to be his or her own lexicographer of patent claim terms, in *ex parte* prosecution it must be within limits. *In re Corr*, 347 F.2d 578, 580, 146 USPQ 69, 70 (CCPA 1965). The applicant must do so by placing such definitions in the Specification with sufficient clarity to provide a person of ordinary skill in the art with clear and precise notice of the meaning that is to be construed. *See also In re Paulsen*, 30 F.3d 1475, 1480, 31 USPQ2d 1671, 1674 (Fed. Cir. 1994) (although an inventor is free to define the specific terms used to describe the invention, this must be done with reasonable clarity, deliberateness, and precision; where an inventor chooses to give terms uncommon meanings, the inventor must set out any uncommon definition in some manner within the patent disclosure so as to give one of ordinary skill in the art notice of the change).

*Obviousness*

A claimed invention is unpatentable if the differences between it and the prior art are “such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art.” 35

1 U.S.C. § 103(a) (2000); *KSR Int'l v. Teleflex Inc.*, 127 S.Ct. 1727, 82 USPQ2d  
2 1385 (2007); *Graham v. John Deere Co.*, 383 U.S. 1, 13-14, 148 USPQ 459, 465  
3 (1966).

4 In *Graham*, the Court held that that the obviousness analysis is bottomed on  
5 several basic factual inquiries: “[ (1) ] the scope and content of the prior art are to be  
6 determined; [ (2) ] differences between the prior art and the claims at issue are to be  
7 ascertained; and [ (3) ] the level of ordinary skill in the pertinent art resolved.” 383  
8 U.S. at 17, 148 USPQ at 467. See also *KSR Int'l v. Teleflex Inc.*, 127 S.Ct. at 1734  
9 82 USPQ2d at 1391. “The combination of familiar elements according to known  
10 methods is likely to be obvious when it does no more than yield predictable  
11 results.” *KSR*, at 1739, 82 USPQ2d at 1396.

12 “When a work is available in one field of endeavor, design incentives and  
13 other market forces can prompt variations of it, either in the same field or in a  
14 different one. If a person of ordinary skill in the art can implement a predictable  
15 variation, § 103 likely bars its patentability.” *Id.* at 1740, 82 USPQ2d at 1396.

16 “For the same reason, if a technique has been used to improve one device,  
17 and a person of ordinary skill in the art would recognize that it would improve  
18 similar devices in the same way, using the technique is obvious unless its actual  
19 application is beyond his or her skill.” *Id.*

20 “Under the correct analysis, any need or problem known in the field of  
21 endeavor at the time of invention and addressed by the patent can provide a reason  
22 for combining the elements in the manner claimed.” *Id.* at 1742, 82 USPQ2d at  
23 1397.

ANALYSIS

*Claims 1, 2, 5-8, 10-13, 16-18, 20-23, and 25-27 rejected under 35 U.S.C. § 103(a) as obvious over Swix, Eyer, and XTV.*

The Appellants argue these claims as a group.

Accordingly, we select claim 1 as representative of the group. 37 C.F.R. § 41.37(c)(1)(vii) (2006).

Claim 1 is directed toward (1) selecting ads of interest to a viewer, (2) transferring one video stream over a first transport system and an advertising video stream over a second transport system that uses lower bandwidth than the first transport system, (3) inserting the advertising stream into the first video stream, and (4) disabling fast-forward of the advertising. The Eyer and XTV references show the disabling of fast-forward, and this is not in dispute, although the Appellants question the relevance of XTV (Appeal Br. 4).

The remaining claimed subject matter, except for the presence of two transport systems and their difference in bandwidth, is described by Swix (FF 04-15), and this description by Swix is undisputed by the Appellants (FF 15).

Thus, the only two issues are (1) whether Swix describes two transport systems and (2) whether the two transport systems use different bandwidths.

Swix brings its regular programming in on one channel and the advertising in on another channel (FF 11-14). The Examiner construes the claim term “transport system” as sufficiently broad to embrace a channel. The term “channel” has many definitions, but the one most pertinent to video signal propagation is “a specified frequency band for the transmission and reception of electromagnetic signals, as for television signals.”<sup>3</sup> A transport system is a system to carry from

1 one place to another (FF 02). Clearly, to transmit a signal at a particular  
2 frequency, there must be circuitry to transmit and receive at that frequency. Such a  
3 collection of circuitry must operate in a coherent fashion to propagate and receive  
4 the signal successfully, such transmission and reception systemically carries the  
5 signal from one place to another. Thus, such circuitry for a given frequency must  
6 constitute a transport system.

7 Swix carries two video streams across two different channels at two different  
8 frequencies. Thus, Swix necessarily describes two transport systems. Thus, we  
9 find the Appellants' arguments unpersuasive that Swix fails to describe a first  
10 transport system for the first stream and a second transport system for the second  
11 stream.

12 The Examiner correctly noted that the second transport system uses less  
13 bandwidth than the first. To address the different bandwidths, the Examiner in  
14 effect took "official notice" of a practice of using different bandwidths for  
15 advertisements as contrasted with regular video content (Answer 5). The  
16 Appellants disagree with the Examiner's approach (Reply Br. 3-4).

17 Thus, an issue is whether it was notoriously well known to one of ordinary  
18 skill, that advertising content, used by Swix's second transport system, would have  
19 used less bandwidth than regular video, used by Swix's first transport system. *Cf.*  
20 *In re Knapp-Monarch Co.*, 296 F.2d 230, 232, 132 USPQ 6, 8 (CCPA 1961); *In re*  
21 *Eynde*, 480 F.2d 1364, 1370, 178 USPQ 470, 474 (CCPA 1973).

22 Any official notice issue is not pertinent to the apparatus claims 12, 13, 16-  
23 18, 20, and 21, or to the product claims 22, 23, and 25-27, because these claims are  
24 broader in scope than that argued by the Appellants. These claims are directed to a  
25 machine and software that use different bandwidths, i.e. their structural limitation

1 is to have the capacity to accommodate streams that use different bandwidths,  
2 where the higher bandwidth is the normal video stream. As structural rather than  
3 procedural categories of invention, it is their structural capacity to perform recited  
4 functions rather than the actual performance of such functions themselves, that  
5 define the claimed subject matter. Because Swix clearly is able to accommodate  
6 regular video in both channels, both of Swix's transport systems have the capacity  
7 to use different bandwidths. Thus, insofar as these claims are concerned, we can  
8 find no error in the Examiner's rejection.

9 As to the method claims, we decline to get into a side-show debate about  
10 whether the Examiner erred in taking official notice. While we believe the fact  
11 officially noticed is entirely correct, we prefer instead to cite prior art which  
12 confirms the fact officially noticed. Accordingly, we enter into the record the  
13 DAVIC reference, *supra*, as evidence in support of the fact officially noticed.

14 In particular, Figure 9-1 on p. 19 portrays a DAVIC enhanced broadcast  
15 service in which a broadcast server transmits a unidirectional signal to the  
16 customer's set top box and an interactive service provider transmits a bi-directional  
17 signal to the same customer's set top box. DAVIC states that, among examples of  
18 its services, are ordering advertised goods displayed during programs and selecting  
19 movies in near video on demand. The broadcast signal is used to deliver actual  
20 content and the interaction network is used for application control and to deliver  
21 additional content information. The additional content information in DAVIC's  
22 interactive signal supplements the broadcast signal, and would therefore be  
23 analogous to Swix's advertising video. Since this network is for interaction, which  
24 spends a considerable time waiting for content, the bandwidth generally consumed  
25 would be substantially less than that for a broadcast signal that is devoted to a

1 unidirectional signal. Also, the necessity for bandwidth allocated to the return  
2 signal in a bidirectional communication would reduce the bandwidth available for  
3 the outbound signal as well. For both of these reasons, a person of ordinary skill  
4 would recognize that DAVIC's outbound portion of its interaction signal would  
5 use less bandwidth than DAVIC's broadcast signal.

6 Thus, we find the fact officially noticed by the Examiner of the relative  
7 disparity between the bandwidth usage of Swix's video streams, further evidenced  
8 by the teachings of DAVIC regarding the transmission of multiple such streams, to  
9 be correct.

10 We are not persuaded that the Examiner erred in combining teachings of  
11 Swix, Eyer, and XTV, along with official notice of the relative disparity of normal  
12 and advertising video signals, or in holding that the combined teachings render  
13 obvious the claimed subject matter. In other words, the prior art suggests doing  
14 what the Appellants did. *In re Fridolph*, 134 F.2d 414, 416, 57 USPQ 122, 124  
15 (CCPA 1943).

#### 16 17 CONCLUSIONS OF LAW

18 The Appellants have not sustained their burden of showing that the  
19 Examiner erred in rejecting claims 1, 2, 5-8, 10-13, 16-18, 20-23, and 25-27 under  
20 35 U.S.C. § 103(a) as unpatentable over the prior art.

21 On this record, the Appellants are not entitled to a patent containing claims  
22 1, 2, 5-8, 10-13, 16-18, 20-23, and 25-27.

DECISION

The rejection of claims 1, 2, 5-8, 10-13, 16-18, 20-23, and 25-27 under 35 U.S.C. § 103(a) as unpatentable over the prior art is affirmed.

Since we have relied on prior art not cited by the Examiner, we designate our affirmance as a new rejection within the meaning of 37 C.F.R. § 41.50(b) (2006).

Our decision is not a final agency action.

37 C.F.R. § 41.50(b) provides that Appellant, *WITHIN TWO MONTHS FROM THE DATE OF THE DECISION*, must exercise one of the following two options with respect to the new rejection:

(1) *Reopen prosecution*. Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the Examiner, in which event the proceeding will be remanded to the Examiner. . . .

(2) *Request rehearing*. Request that the proceeding be reheard under § 41.52 by the Board upon the same record. . . .

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2006).

AFFIRMED – 37 C.F.R. § 41.50(b)

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